MOTION FILED
DEC 3 - 2003

Supreme Court, U.S.
FILED
DEC
OFFICE OF THE CLERK

No. 03-667

IN THE

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1 and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

MOTION AND BRIEF OF PUBLIC CITIZEN AND NATIONAL CENTER FOR TOBACCO FREE KIDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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December 4, 2003

MOTION OF PUBLIC CITIZEN AND NATIONAL CENTER FOR TOBACCO FREE KIDS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Movants Public Citizen and the National Center for Tobacco Free Kids move the Court to grant them leave to file the accompanying brief as amici curiae in support of the petition for a writ of certiorari. The petition raises the question of whether libel claims based on statements contained in petitions to government officials or bodies are protected by the same qualified immunity as statements about public officials and public figures.[1]

Public Citizen is a non-profit organization based in Washington, D.C., with about 150,000 members. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to petition their governments – national, state, and local – for redress of grievances related to the activities of individuals, corporations, public officials, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Public Citizen itself files numerous petitions every year, including petitions directed to such federal agencies as the Food and Drug Administration, requests to legislators to enact legislation, and lawsuits filed in the courts. *E.g.*, http://www.citizen.org/publications/index.cfm?sectionID=106&catID=126. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First

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[1]Petitioners have consented to the filing of the amicus brief; a copy of a letter from petitioner's counsel has been lodged with the Clerk. Respondent objects to the motion.

Amendment rights of citizens who participate in public debate.

The National Center for Tobacco Free Kids works to protect minors from tobacco by raising awareness that tobacco is a pediatric disease, by changing public policies to limit marketing and sales of tobacco, and by altering the environment in which decisions about tobacco use and tobacco policy are made. The Center and other public health organizations with whom it works frequently petition various federal agencies, such as the Food and Drug Administration, the Federal Trade Commission and the Occupational Safety and Health Administration, to address what they believe are important public health issues related to tobacco.

Both from their own petitioning activities and from those of its members, amici have learned of the intimidating effect of lawsuits filed over petitioning activity. In recent years, amici have watched with dismay as an increasing number of companies have resorted to litigation to prevent ordinary citizens from speaking out to their government representatives about the manner in which companies have conducted their affairs, and from urging the government to take actions against the companies. In a number cases, companies have brought suit, hoping to silence their critics through the threat of ruinous litigation. The mere threat of litigation, and the prospect of being held liable if a court second-guesses the truth of any statement made in the course of petition activity, can easily discourage citizens from exercising the right to petition the government.

Unlike petitioners, amici and their members file their petitions to secure purely political objectives – such as protecting the public from unsafe products, an unhealthy environment, or unlawful trade practices – not to advance their own economic interests. Amici seek leave to file this brief to urge the Court to protect the quintessentially political activity

that the Petition Clause was intended to foster, by extending to all Petition Clause activity the fullest measure of First Amendment protection that the "actual malice" standard accords to speech about public officials and public figures.

Respectfully submitted,

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QUESTION PRESENTED

Under the First Amendment's Petition Clause, are statements addressed to government representatives that criticize a third party entitled to the protection of the qualified privilege for criticisms of public officials and public figures recognized under *New York Times v. Sullivan* against defamation claims brought by the third party?

INTEREST OF AMICI CURIAE

The interest of amici curiae is set forth in the accompanying motion for leave to file as amici curiae.

ARGUMENT

In *McDonald v. Smith*, 472 U.S. 479 (1985), the Court refused to grant absolute immunity under the Petition Clause of the First Amendment to a person who is sued for libel based on statements made in the course of communications to a public official. However, the Court's characterizations of the protection that the Petition Clause **does** provide have given rise to varying constructions in the lower state and federal courts that threaten to discourage citizens from engaging in petition activity, and that are at the heart of the petition in this case.

The bulk of the Court's discussion was devoted to two lines of analysis showing the existence of a qualified privilege requiring a showing of malice before liability may be imposed for petitioning activity. First, the original understanding of the Petition Clause, as shown by cases during the first half of the nineteenth century discussing the common law petition privilege, characterized the privilege as excluding "malicious and wanton" speech, 472 U.S. at 483-484 (discussing early cases involving the common law petition privilege). Second, the Court observed that because its Petition Clause cases, in contexts other than defamation, denied protection to "baseless litigation," the Clause was not understood to protect intentional and reckless falsehoods. *Id.* at 484.

On the other hand, the penultimate paragraph of the opinion in *McDonald* stated that the Petition Clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble, . . . and there

[1/] This brief was written solely by undersigned counsel and not even in part by counsel for a party. Its preparation and submission were financed solely by Public Citizen with no support from any party.

is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment protections." *Id.* at 485. Then, in its concluding paragraph, *id.*, the Court noted that state law allowed recovery only if the defendant acted with "malice," a term defined consistent with the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964); the Court refused to construe the Petition Clause as expanding this privilege to an absolute one. 472 U.S. at 485.

Several lower courts, including the Seventh Circuit and the Washington Supreme Court and the Maryland Court of Appeals, have followed the Court's actual discussion of the Petition Clause in the first part of its opinion to conclude that the Clause confers protection against liability unless the defendant has made false statements with actual malice.[2] The Eighth Circuit, however, understood the sentence finding "no sound basis for . . . greater protection to . . . a petition . . . than other First Amendment protections" as meaning that, when other parts of the First Amendment allow liability to be imposed for negligence, the Petition Clause also does not provide any further protection.[3] In the decision below, the Michigan Supreme Court sided with the Eighth Circuit against the other lower courts in its construction of *McDonald.*[4]

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[2]*Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988); *Miner v. Novotny*, 498 A.2d 269 (Md. 1985); *Richmond v. Thompson*, 922 P.2d 1343 (Wash. 1996)

[3]*In re IBP Confidential Business Documents Litigation*, 797 F.2d 632 (8th Cir. 1986) (*en banc*).

[4]In a special concurrence, Justice Young analyzed the original understanding of the Petition Clause and concluded

The majority approach is the better one. It is the more sensible construction of the Court's opinion in *McDonald* because, if allegedly libelous statements contained in petitions to the government are protected only to the extent that they are already protected under the Free Speech Clause, then the result would be not that the Petition Clause protects only as much as the Free Speech Clause does, but that the Petition Clause protects not at all, or at least that it is mere surplusage in the First Amendment. If the Petition Clause is to mean anything in the libel context, it must be that statements receive maximum protection under the First Amendment regardless of whether the statements are in a petition to government agencies in the legislative, executive, or judicial branches of government, and regardless of who is criticized in the petition.

This understanding of the protection provided by the Petition Clause is also the most consistent with the considerations that animated the creation of the *New York Times* standard for protection of statements about public officials and public figures, which are equally applicable to statements contained in petitions directed to government officials for the redress of grievances. Just as public officials and public figures may be presumed to have access to the media and other means of communication to publicize their responses to allegedly defamatory criticism, a petition for redress of grievances is, by its nature, addressed to a limited audience – a judge, a legislative body, or an administrative agency – and a person who claims to have be defamed in the petition should be able to direct a response to the criticisms to the same audience.

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that it required protection for petitioners, but he joined the judgment on the ground that *McDonald* departed from that original understanding and he was bound by *McDonald* until it was reversed by this Court.

And, just as statements about public officials and public figures deserve maximum protection under the First Amendment because such statements go to the heart of the democratic process, so similarly petitions to government officials and government bodies for redress of grievances go to the heart of the democratic process that the First Amendment was designed to protect.

Extending the *New York Times* standard to all libel claims based on statements made in a protected petition would also be most consistent with the Court's Petition Clause cases, which have required not just that the petitioner must have made baseless claims or statements, but also that the statements have been made for a bad motive. In antitrust cases under the *Noerr-Pennington* doctrine, for example, the claims in the petition must have been made for the purpose of suppressing competition, and the petitions must have been ones on which the defendant knew that it could not succeed or, at least, was indifferent to the possibility of success. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 65-66 (1993). The fact that the cause of action is for libel rather than restraint of trade should not reduce the degree of protection provided by the First Amendment. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Similarly, under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), for a libel lawsuit to be actionable under the National Labor Relations Act, the lawsuit must not only have been baseless, but it must have been brought without any reasonable basis – *i.e.*, it must have been brought for the purpose of retaliating against workers who exercise their rights under the NLRA. This combination of falsity and bad motive is comparable to the *New York Times* requirement that falsity be accompanied by knowledge of falsity, or by reckless indifference to probable falsity.

Because the lower courts have reached conflicting conclusions about whether the First Amendment confers a *New York Times*-like privilege on all petitions to the government, or whether the full protection of the Petition privilege depends on whether the petition is directed at a government official or public figure, the Court should grant certiorari to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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